

D.P.U. 94-114

Petition of Nantucket Electric Company, pursuant to G.L. c. 164, § 94A, for approval of a Power Sales Contract between New England Power Company and Nantucket Electric Company, a Facilities Support Agreement for Nantucket Cable Electric Company, Inc. between Nantucket Cable Electric Company, Inc., and Nantucket Electric Company, and a Preliminary Support Agreement between New England Power Company and Nantucket Cable Company.

APPEARANCES: David S. Rosenzweig, Esq.
Steven Halpern, Esq.
Keohane & Keegan
21 Custom House Street
Boston, Massachusetts 02110
FOR: NANTUCKET ELECTRIC COMPANY
Petitioner

Attorney General L. Scott Harshbarger
By: Walter F. McDonough
Kevin J. McNeely
Assistant Attorneys General
131 Tremont Street
Boston, Massachusetts 02111
Intervenor

George C. Jordan, III
The Gatehouse/Wentfort Hall
Lenox, Massachusetts 02140
Limited Participant

Brock Lewis
22 Balsam Court
Lawrenceville, New Jersey 08648
Limited Participant

Jane Walton
22 North Pasture Lane
Nantucket, Massachusetts 02554
Limited Participant

I. INTRODUCTION

On May 17, 1994, Nantucket Electric Company ("Nantucket" or "Company") filed with the Department of Public Utilities ("Department") a Petition ("Petition") consisting of three contracts for approval pursuant to G.L. c. 164, § 94A: (1) Power Sales Contract Between New England Power Company ("NEPCo") and Nantucket Electric Company (the "PPC"); (2) Preliminary Support Agreement Between NEPCo and Nantucket Electric Company (the "PSA"); and (3) Facilities Support Agreement for Nantucket Cable Electric Company, Inc., Between Nantucket Cable Electric Company, Inc. and Nantucket Electric Company (the "FSA").¹ The Petition indicates that the contracts, taken together, will provide for the supply of all of the Company's future requirements for electricity, as determined by the Company's most recent demand forecast and supply plan filing. Nantucket Electric Company, D.P.U. 93-137 (1994) ("D.P.U. 93-137").

In that filing, the Company proposed the construction of a 26-mile submarine cable from Harwich, Massachusetts to Nantucket as the least-cost, most reliable, and most environmentally sound means to supply electricity to Nantucket ratepayers (i.d. at 1). The Department approved a settlement between the parties to that proceeding in which the parties agreed that the demand forecast was reasonable, appropriate, and reliable and that the Company's short-term and long-term supply plans are adequate and represent the least-cost,

¹ The Company also filed for information purposes a fourth contract, the Equity Funding Agreement (the "EFA") for the Nantucket Cable Electric Company, Inc., which grants Nantucket the option of purchasing up to a 20 percent equity interest in Nantucket Cable Electric Company.

least-environmental impact alternatives for meeting the Company's future electricity needs (i d. at 12).

Pursuant to notice duly issued, the Department conducted hearings on the Petition on September 27 and 29, 1994. The Attorney General of the Commonwealth ("Attorney General") filed a notice of intervention pursuant to G.L. c. 12, § 11E. Limited participant status was granted to Brock Lewis, George Jordan III, and Jane Walton. In support of its filing, the Company sponsored the testimony of Richard LaCapra, principal of LaCapra Associates. The evidentiary record consists of 7 exhibits and eight responses to record requests.

II. DESCRIPTION OF CONTRACTS

As noted above, Nantucket filed three contracts for Department approval, all dated January 1, 1994: (1) the PPC between NEPCo and Nantucket; (2) the PSA between NEPCo and Nantucket; and (3) the FSA between Nantucket Cable and Nantucket. The PPC provides for the sale of electricity to Nantucket for twenty years while the PSA and FSA relate to the development, planning, financing, construction, control, use and operation of the cable.

The PPC is an all-requires purchase power agreement which allows Nantucket the option of taking power under one of two options: (1) NEPCo's wholesale tariff,² or (2) fixed price schedules contained in the PPC (PPC at 3; Exh. NEC-RLC-1, at 5).³ The

² NEPCo's tariff is NEPCo's FERC regulated wholesale tariff for firm energy and capacity (PPC at 8).

³ The fixed price schedules contain escalators built into the energy charge based upon the Consumer Price Index and changes in the price of fuel oil (PPC at 8-9).

PPC provides for a cable credit through the year 2006 (PPC at App. G). The cable credit is a reduction in the charge for all kilowatt hours of adjusted load, up to a specified maximum annual credit (i.d.).⁴ The amount of cable credit will depend on the total capitalized cost of the cable facilities (i.d.).⁵ In addition, the PPC allows Nantucket to reduce its purchases from NEPCo, without penalty, by (1) purchasing power from on-island and off-island and renewable resources, and (2) pursuing cost-effective demand side management (PPC at 15; Exh. NEC-RLC-1, at 5-6). Additionally, the PPC provides (1) a capacity credit for Nantucket's on-island generation, which escalates as load increases, and (2) a mechanism for Nantucket to sell any on-island back-up capacity that is not subject to the capacity credit (PPC at 13-15; Exh. NEC-RLC-1, at 6).

The purpose of the PSA is to provide support for the development of the cable project until the effective date of the FSA (PSA at 1). The PSA specifies that NEPCo will provide up to \$2.5 million for the development of the Cable Project (i.d. at 2).⁶ In addition, the PSA establishes an Oversight Committee to review and approve major cable project expenses described further in the FSA, as indicated below (i.d.).

⁴ The amount of cable credit is greatest in the early years of the contract (PPC at App. G).

⁵ There are two schedules for the cable credit, one schedule if the total capitalized cost of the cable facilities exceeds \$24.0 million and one schedule if the total capitalized cost of the cable facilities is \$24.0 million or less (PPC at App. G).

⁶ The PSA provides that NEPCo will reimburse Nantucket up to one million dollars for expenses incurred by Nantucket prior to the signing of the PSA, for all expenses which would be recoverable under the FSA (PSA at 2).

The FSA establishes the rights and obligations of Nantucket and Nantucket Cable during the construction and operational phases of the cable project (Exh. NEC-RLC-1, at 4).⁷ The FSA provides that Nantucket Cable will construct, own, operate and maintain the cable facilities and that Nantucket will have exclusive rights to the cable facilities for the import and export of energy and capacity (FSA at 1, 8-9). The FSA also specifies Nantucket's financial obligations to Nantucket Cable for the twenty-year period, commencing with commercial operation of the cable, including (1) a monthly support charge based on a monthly cost-of-service formula which includes cable operating expenses and a return on investment and (2) a monthly management fee in the amount of \$12,500 per month for each month that Nantucket Cable achieves a supply availability factor of 99.5 percent (Exh. NEC-25).⁸ In addition, the FSA provides for the establishment of an Oversight Committee, composed of two members appointed by Nantucket and one member appointed by Nantucket Cable (FSA at 3-6).⁹

⁷ The FSA becomes effective upon the last to occur of the following: (1) receipt by Nantucket Cable of all regulatory approvals authorizing Nantucket Cable to charge Nantucket Electric in accordance with the FSA; (2) receipt by Nantucket Cable of all major regulatory approvals and licenses for the construction and operation of the cable facilities; (3) the date that Nantucket Cable first receives borrowed funds as a part of a debt financing arrangement with third party lenders, not including vendor financing; and (4) the date that the last of the EFA or PSA becomes effective or would become effective but for a condition that its effectiveness is subject to the FSA becoming effective (FSA at 2).

⁸ The FSA provides Nantucket with the option of acquiring the ownership of the cable at the end of this 20-year period (FSA at 2-3).

⁹ The Oversight Committee will be funded by Nantucket Cable at a maximum annual amount of \$100,000 prior to the commercial operation of the facilities and \$25,000, adjusted by the Consumer Price Index, for subsequent years (FSA at 3-4).

III. ARGUMENTS OF THE PARTIES

The Hearing Officer requested that the Company and the Attorney General address three briefing questions relating to: (1) the jurisdiction of the Department over each of the Agreements and whether Department approval is required for the project to go forward; (2) the jurisdiction of FERC over each of the agreements; and (3) the impact on each of the Agreements of a merger or buy-out of Nantucket by the New England Electric System ("NEES") or one of its affiliates.

A. Arguments of the Company

The Company argued that each of the three agreements, the PPC, the PSA and the FSA, is subject to the jurisdiction of the Department pursuant to G.L. c. 164, § 94A ("Section 94A") (Company Brief at 2-3). The Company noted that Section 94A requires Department approval of an electric company's contract for the purchase of electricity for a period in excess of one year, unless said contract contains a provision subjecting the price to be paid for the electricity to review pursuant to G.L. c. 164, §§ 93 or 94 (i.d. at 3). The Company stated that the PPC provides for the sale of electricity to Nantucket for a period of twenty years and does not contain a specific provision subjecting its pricing to review pursuant to G.L. c. 164, §§ 93 or 94 (i.d. at 4). Therefore, the Company asserted that the PPC is subject to Department jurisdiction pursuant to Section 94A (i.d.).

With respect to the Department's jurisdiction over the PSA and FSA, the Company stated that the PPC would not be feasible without the PSA and FSA in that these agreements together provide for the financing, construction and support of the facilities necessary for

electricity to be delivered pursuant to the PPC (i.d.).¹⁰ The Company stated that, therefore, the three agreements represent a single, integrated arrangement for the purpose of the purchase of electricity by Nantucket, and thus require Department review under Section 94A (i.d.).¹¹

In addition, the Company argued that Department review of the PPC without review of the PSA and FSA would not be consistent with (1) the purpose of Section 94A, or (2) Department precedent (i.d. at 5).¹² The Company stated that the purpose of Section 94A is to allow the Department to review the total cost of purchased power (i.d.). Therefore, the Department's standard of review requires each purchase power contract to be "a cost-effective means of providing reliable service vis-a-vis other resource options that may be available to the Company." (i.d., citing Commonwealth Electric Company, D.P.U. 89-218, at 4 (1990)). The Company asserted that evaluation of the cost-effectiveness of a power purchase contract without evaluation of the cost of transmission of that power would be an

¹⁰ The Company stated that the three agreements are the means for effecting the Cable Project that was approved by the Department in D.P.U. 93-137 (Company Brief at n.2).

¹¹ The Company stated that it is standard practice to incorporate transmission arrangements necessary for a power purchase directly into power purchase agreements when such transmission arrangements are not as complex as the arrangements in the instant proceeding (Company Brief at 5). The Company stated that therefore, such transmission arrangements would be reviewed by the Department (i.d.).

¹² The Company stated that the Department has previously evaluated, pursuant to Section 94A, the cost-effectiveness of a total project including the cost of the power purchase and the cost of transmission facilities required for the delivery where the arrangements for providing and paying for the transmission facilities were separate from the power purchase agreements (Company Brief at 6, citing New England Power Company, et. al., D.P.U. 1204 (1982) (Hydro-Quebec Phase I); New England Power Company, et. al., D.P.U. 86-247 (1987) (Hydro-Quebec Phase II)).

incomplete evaluation (i.d. at 5-6).¹³ Further, the Company argued that the Cable Project would not be able to proceed without Department approval of the FSA and PSA (i.d. at 10-11). The Company stated that the FSA specifies that all regulatory approvals necessary for the construction, operation and financing of the Cable must be obtained in order for the FSA to go into effect (i.d. at 11).

With respect to the second briefing question regarding FERC jurisdiction, the Company argued that both the Department and FERC have jurisdiction over the subject contracts for different purposes (Company Brief at 7-10). The Company stated that the FERC has exclusive jurisdiction over the rates applicable to wholesale transactions and thus the authority to review whether the contracts produce just and reasonable rates and whether the costs incurred by Nantucket Cable and NEPCo are prudent (i.d.).¹⁴ The Company stated that the Department has jurisdiction over a retail electric company's entry into a wholesale power transaction pursuant to Section 94A and therefore has the authority to determine whether it is (1) reasonable and appropriate for the Company to incur the costs associated

¹³ The Company further stated that the Department has already included the consideration of the costs associated with the FSA and PSA in approving the Company's supply plan in Nantucket Electric Company, D.P.U. 93-137 on the basis that it was the most cost-effective alternative (Company Brief at 7). Therefore, the Company argued that, therefore, in order for the Department to evaluate the true cost-effectiveness of Nantucket's proposed power purchase, it would not be practical to evaluate the PPC without consideration of the FSA and PSA (i.d.).

¹⁴ The Company indicated that once the Agreements are approved by FERC they would become part of a filed rate subject to FERC's exclusive jurisdiction but that the Department may intervene at the FERC in a proceeding in which FERC has exclusive jurisdiction (Company Brief at 10).

with the contracts, and (2) prudent for the Company to decide to enter into the contracts (i d.).

Finally, with respect to the third briefing question regarding the impact of a merger or buy-out of Nantucket by NEES or one of its affiliates, the Company responded that this question is premature given that the terms and conditions of a potential merger or buy-out are under negotiation (Company Brief at 13). The Company stated that the impact of a merger or buy-out of Nantucket by NEES or one of its affiliates on the Agreements would depend on the form, terms and conditions of such an acquisition (i d.).

B. Arguments of the Attorney General

The Attorney General asserted that the Department has jurisdiction over each of the Agreements under Section 94A (Attorney General Brief at 4). The Attorney General stated that the PPC, PSA and FSA should be considered one entity because the sale of wholesale power under the PPC requires construction of a mode of energy transmission (i d.). The Attorney General argued that, in describing the rights and obligations of the parties during and after construction of the transmission facilities, the PSA and FSA are integrally related to the PPC and are thus, subject to Department approval (i d.). In addition, the Attorney General argued that Department approval is required for the project to go forward given that Section 94A specifies that failure to obtain authorization for a contract for wholesale power for a term greater than one year would render such a contract "null and void" (i d. at 4-5).

With respect to the issue of FERC jurisdiction, the Attorney General stated that each of the agreements appears to be subject to the jurisdiction of the FERC given the FERC's jurisdiction over wholesale sale of electricity and transmission contracts (i d. at 5). The

Attorney General stated that the FERC and the Department have concurrent jurisdiction over the agreements and that Department approval of each of the agreements should be conditioned upon FERC approval (i.d.). Finally, the Attorney General noted that more detailed information would be required in order to provide the Department with an analysis of the impact of a merger on the further operation of the PPC, PSA, and FSA (i.d. at 6).

V. ANALYSIS AND FINDINGS

The contracts were filed pursuant to G.L. c. 164, § 94A, which states in pertinent part:

No gas or electric company shall hereafter enter into a contract for the purchase of gas or electricity covering a period in excess of one year without the approval of the department, unless such contract contains a provision subjecting the price to be paid thereunder for gas or electricity to review and determination by the department in any proceeding brought under section ninety-three or ninety-four Any contract covering a period in excess of one year subject to approval as aforesaid, and which is not so approved or which does not contain said provision for review, shall be null and void.¹⁵

The Department has construed Section 94A to include a determination of whether the petitioner has demonstrated that the subject contracts are in the best interests of the petitioner's ratepayers, New England Power Company, et al., D.P.U. 1204 (1982) ("Hydro-Quebec I"), and whether the petitioner has demonstrated that the subject contracts are cost-effective, New England Hydro-Transmission Electric Company, Inc., and New England

¹⁵ The subject contracts do not contain a provision for future review of the price of electricity pursuant to Sections 93 and 94. Consequently, the text appearing at the beginning of the statute is the operative text for our analysis.

Power Company, D.P.U. 86-247 (1987) ("Hydro-Quebec I I"). Appl i cati on of Secti on 94A, however, requi res a preli mi nary determi nati on that each contract falls wi thi n the general juri sdi cti on of the Department.^{16,17}

Of the three contracts fi led for Secti on 94A approval , only the PPC i s cl early "a contract for the purchase of gas or electri ci ty." The PSA and FSA, whi le relat ed to the PPC, do not sati sfy thi s defi ni ti on i ndependent of the PPC. However, upon revi ew of the terms and purpose of these contracts, we fi nd that these contracts are a necessary and i ntegral part of the purchase of power, and wi thout these contracts the PPC woul d be i noperabl e.¹⁸ Because of the i ntegrated nature and content of the contracts and the rel ati onshi p of the PSA and FSA to the PPC, the Department fi nds that al l three contracts are consi stent wi th the Hydro-Quebec precedents and are therefore approved as requested by the peti ti oner.¹⁹

¹⁶ Addi ti onal ly, we note that on December 14, 1994, the Federal Energy Regul atory Commi ssi on ("FERC") accepted for fi li ng the PPC, PSA, and FSA (RR-DPU-6, Supp.). The Company shal l fi le wi th the Department on an i nformati onal basi s, accompani ed by expl anatory comments, any proposal fi led at FERC to modi fy the PPC, PSA, or FSA.

¹⁷ Department Orders on peti ti ons fi led pursuant to G.L. c. 164, § 94A have gi ven that secti on a broad constructi on. Whether that constructi on wi ll remai n appropri ate i n i ncreasi ngly competi ti ve energy markets remai ns to be seen. The Department may reexami ne i ts treatment of Secti on 94A and other forms of preapproval i n a future i nvesti gati on.

¹⁸ We note that the PSA and FSA are not conventi onal constructi on contracts whi ch mi ght be subject to the revi ew of the Energy Faci li ti es Si ti ng Board under G.L. c. 164, § 69J but not to Department revi ew under Secti on 94A.

¹⁹ I n D.P.U. 93-137, the Department found that Nantucket's supply pl an woul d "afford reli abi li ty at least-cost and wi th least envi ronmental i mpact" and that "the i nterest of ratepayers woul d be best advanced through acceptance of the Settl ement."

VI . ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the Power Sales Contract Between New England Power Company and Nantucket Electric Company, the Facilities Support Agreement for Nantucket Cable Electric Company, Inc., Between Nantucket Cable Electric Company, Inc. and Nantucket Electric Company, and the Preliminary Support Agreement Between New England Power Company and Nantucket Electric Company are hereby approved.

By Order of the Department,

Kenneth Gordon, Chairman

Mary Clark Webster, Commissioner

D.P.U. 93-137, at 13. Our approval of these contracts extends the same caution to the Department voiced in D.P.U. 93-137: "[i]f the Company encounters events or costs that may conflict with the representation that the supply plan is least cost, the Company must notify immediately the Department and parties in this proceeding." Id.

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).